Petition

Supreme Court, U.S.
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81-1904

IN THE SUPREME COURT OF THE UNITED STATES

NO.:

WILLIAM D. COBB, :

Petitioner, :

vs. :

LOUIE L. WAINWRIGHT, :

Respondent. :

_____/

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Courts below erred in finding that the trial record contained sufficient evidence to support Petitioner's conviction beyond a reasonable doubt?

   A. Was the evidence insufficient to convict WILLIAM D. COBB of unnecessarily killing DONALD ELDRIDGE?

   B. Did the State fail to meet its burden of proof at trial?

2. Whether the Courts below erred in not finding that Florida Statutes 776.05 and 776.07(1) justified the Petitioner's use of deadly force under the facts of the case, as a matter of law?

3. Whether the Courts below erred in finding that Florida Statute 782.11(1975) was not unconstitutionally vague?

   A. Does Florida Statute 782.11(1975) fail to provide ascertainable standards?

   B. Whether enforcement of 782.11(1975) in this case constitutes a violation of

the ex post facto provision of the United States Constitution?

C. Whether 782.11(1975) is violative of due process of law due to its overbroad application in this case?

4. Whether the Courts below erred in not finding that the Petitioner was denied a fair trial and denied due process of law under the totality of the circumstances of the trial?

A. Did the Prosecutor's remarks at trial deny WILLIAM D. COBB a fair trial contrary to due process of law?

B. Did the Trial Court apply the wrong law?

C. Has each reviewing court misinterpreted the facts concerning the decedent's wounds?

D. Conclusion.

IN THE SUPREME COURT OF THE UNITED STATES

NO.:

WILLIAM D. COBB, :

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vs. :

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, :

Respondent/Appellee. :

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TO THE UNITED STATES COURT OF APPEALS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

WILLIAM D. COBB, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 4, 1982.

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit, dated February 4, 1982, rehearing denied on February 4, 1982, is unreported at present and printed in Appendix A hereto, at page 1. This opinion was substituted for that of the Circuit Court of Appeals for the Fifth Circuit reported at 656 F2d 982 (1981). The Order of Dismissal of the United States District Court for the Southern District of Florida, unreported, is printed in Appendix A hereto, page 16. The opinion of the Supreme Court of Florida, reported at 376 So.2d 230, rehearing denied on November 13, 1979, is printed in Appendix A hereto, page 31. This case was transferred from the 4th District Court of Appeals on March 28, 1978 and is printed in Appendix A hereto, page 43. The Entry of Judgment of the Circuit Court of the Seventeenth Judicial Circuit is printed in Appendix A hereto, page 45 .

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 1.) was entered on February 4, 1982. A timely petition for rehearing was denied on February 4, 1982. The jurisdiction of the Supreme Court is invoked under 28 USC §1254 and §1257(3).

QUESTIONS PRESENTED

1. Whether the Courts below erred in finding that the trial record contained sufficient evidence to support Petitioner's conviction beyond a reasonable doubt?

   A. Was the evidence insufficient to convict WILLIAM D. COBB of unnecessarily killing DONALD ELDRIDGE?

   B. Did the State fail to meet its burden of proof at trial?

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3. Whether the Courts below erred in finding that Florida Statute 782.11(1975) was not unconstitutionally vague?

   A. Does Florida Statute 782.11(1975) fail to provide ascertainable standards?

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B. Did the Trial Court apply the wrong law?

C. Has each reviewing court misinterpreted the facts concerning the decedent's wounds?

D. Conclusion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis provided)

2. The Fourteenth Amendment, United States Constitution which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis provided)

3. Article One, Section 10, United States Constitution which provides:

> "No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make anything but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts, or grant any Title of Nobility." (emphasis provided)

4. The Statute under which the Petitioner was convicted was Florida Statute 782.11(1975) which provides:

> "782.11 Unnecessary Killing to Prevent Unlawful Act"
>
> "Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter, a felony of the second degree, punishable as provided in §775.082, §775.083 or §775.084."

5. A Statute under which Petitioner sought post-conviction relief was Florida Statute 776.05, which provides as follows:

> "A law enforcement officer or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably

believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice."

6. A statute under which Petitioner sought post conviction relief was Florida Statute 776.07(1) which provides as follows:

"776.07 Use of Force to Prevent Escape"

"(1) A law enforcement officer or other person who has an arrested person in his custody is justified in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person from custody."

7. A statute under which Petitioner sought post conviction relief was Florida Statute 782.02 which provides as follows:

"782.02 Justifiable Use of Deadly Force"

"The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be."

8. A statute under which Petitioner sought post conviction relief was Florida Statute 843.01 which provides as follows:

"Resisting Officer With Violence To His

Person"

"Whoever knowingly and willfully resists, obstructs or opposes any sheriff, deputy sheriff, officer of the Florida Highway Patrol, municipal police officer, beverage enforcement agent, officer of the Game and Fresh Water Fish Commission, officer of the Department of Natural Resources, any member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, any county probation officer or any personnel or representative of the Department of (Criminal) Law Enforcement or other person legally authorized to execute process, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084."

9. A statute under which Petitioner sought post conviction relief was Florida Statute 784.07 which provides as follows:

"Assault or Battery of Law Enforcement Officers or Firefighters; Reclassification of Offenses"

"(1)(a) As used in this section, the term "law enforcement officer" includes, but shall not be limited to, any sheriff; deputy sheriff; municipal police officer; highway patrol officer; beverage enforcement agent; county probation officer; state, county or municipal correctional officer; officer of the Parole and Probation Commis-

sion; parole and probation officer; and law enforcement personnel of the Game and Fresh Water Fish Commission and the Department of Natural Resources and Law Enforcement.

(b) "Firefighter" as used in this section shall mean any person employed by any public employer of this state whose duty it is to extinguish fires, to protect life or property, or to enforce municipal, county, and state fire prevention codes, as well as any law pertaining to the prevention and control of fires.

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer of firefighter while the officer or firefighter is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree."

TABLE OF ABBREVIATIONS

T = Citation to the pages of the transcript of the trial of William D. Cobb in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida of February 4, 1977.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS IN THE CASE NOW BEFORE THE COURT.

Petitioner, WILLIAM D. COBB, was convicted in a Florida District Court of unnecessary killing to prevent an unlawful act in violation of Florida Statute 782.11 (1975) and was sentenced to 15 years imprisonment on February 4, 1977.

He appealed to the Florida 4th District Court of Appeal. Because part of the appeal questioned the constitutionality of Florida Statute 782.11, under Florida law, the case was transferred, without opinion, to the Florida Supreme Court. Appendix A hereto, page 43. The Florida Supreme Court affirmed the Trial Court's verdict in a 5 - 2 decision and denied rehearing. Appendix A hereto, page 31. This exhausted State remedies to the Appellant, who then petitioned a writ of habeas corpus from United States District Court for the Southern District of Florida, pursuant to 28 USC 2254, alleging that he

was denied due process because Florida Statute 782.11 (1975) is unconstitutionally vague, (particularly when read with Florida Statute 782.01) and because the prosecutor's evidence was insufficient to prove that Petitioner's contentions of Federal constitutional violations had a reasonable likelihood of being sustained and that a serious question exists as to the constitutionality of Florida Statute 782.11 (1975). Appendix A hereto, page 16. U.S. District Judge Alcee Hastings denied the petition and the 5th U.S. District Court of Appeals affirmed. Appendix A hereto at page 16.

Upon the denial of his timely motion for rehearing, WILLIAM D. COBB filed this petition for a writ of certiorari to the U.S. Supreme Court, pursuant to 28 USC 1254.

B. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION FOR MANSLAUGHTER.

On June 16, 1976, WILLIAM D. COBB, a police officer for Parkland, Florida, was dispatched by his commander to a cow pasture

known to contain hallucinogenic mushrooms, to investigate a complaint that two trespassers had climbed the fence and entered the field. Earlier the same evening, COBB had arrested two subjects for trespassing in a pasture. COBB came upon DONALD ELDRIDGE and attempted to arrest him for trespassing. After he had placed a handcuff on ELDRIDGE'S left wrist, but before he could secure the right wrist, COBB was jumped from behind and knocked to the ground by the second trespasser, ROGER DAUGHERTY. After getting back on his feet, and still holding on to ELDRIDGE, COBB noticed DAUGHERTY approaching him menacingly, with something in his hand. COBB pulled out his revolver. When DAUGHERTY failed to respond to an order from COBB to stop, COBB fired a warning shot which struck DAUGHERTY, mortally wounding him. ELDRIDGE then struck COBB in the head across his eye with the handcuff, and grabbed for COBB'S gun. While struggling for possession of the

weapon, COBB pulled the trigger, killing ELDRIDGE with a single shot through his head. Although COBB was found not guilty of unnecessarily killing DAUGHERTY, he was found to be in violation of Florida Statute 782.11 (1975) and convicted of unnecessarily killing ELDRIDGE.

Petitioner was convicted under a statute which is unconstitutionally vague and defective. Florida Statute 782.11 (1975) provides that: "Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter."

Standing alone, this statute is unconstitutionally vague since an ordinary reasonable person must guess at what conduct is prohibited. Due to the phrase "unnecessarily kill", the statute is further obscured by the terms of Florida Statute 782.02, entitled

"Justifiable Use of Deadly Force", which provides: "The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be."

Because of the grave effects of the application of Florida Statute 782.11 (1975) to a police officer in this case, the serious allegations by Petitioner that prosecution thereunder violates due process and other conflicting statutory provisions, the constitutionality of WILLIAM COBB'S conviction under Florida Statute 782.11 (1975) must be determined by the United States Supreme Court. Under the facts of the COBB case, to allow him to be convicted of unnecessarily killing, while at the same time being entitled to the protection afforded to a police officer in such a plight as his, under Chapter 776, Florida Statutes, makes this an unusual, important and compelling case for this Court to

exercise its supervisory power of review by way of certiorari.

Essentially, the issues are ones of fair notice to the offender of what is forbidden conduct with such clarity as to meet constitutional due process requirements; whether a police officer, as a reasonable man, called upon to make a judgment during a struggle over a deadly weapon, justifiedly relied on statutory provisions regulating his lawful use of force in factual circumstances which are extant in the instant case. Further, there is an important need for public policy considerations here to clearly put peace officers on fair notice as to when and when not to use deadly force in the apprehension of criminals. Florida Statute 782.11 making it manslaughter to unnecessarily kill another to prevent an unlawful act does not meet this crucial policy need but is instead, vague, risk-prone and an unreliable standard.

The United States Supreme Court has long

recognized the fact that review of denial of a writ of habeas corpus is a compelling subject for review on certiorari where it involves serious allegations of due process violations. Thomas v. State of Arizona, 78 S.Ct. 885, 356 U.S. 390, 2 L Ed 863 rehearing denied 78 S.Ct. 1379 357 U.S. 949 2 L Ed 2d 1557 (1957). Likewise, the Supreme Court has granted certiorari to review a state court defendant's allegations in a federal habeas corpus proceeding to the effect that he had been denied due process and a fair trial in the State Court. U.S. ex rel Darcy v. Handy, 76 S.Ct. 765 351 U.S. 454 100 L Ed 1331 (1956). COBB, Petitioner herein, makes both of these serious allegations in this petition.

A review of the record will show that the trial judge and prosecutor were confused and and disturbed by the vagueness of the statute and were at a loss as to how to properly instruct the jury regarding it. Further, the prosecutor, over the objections of the de-

fense counsel, and with the tacit approval of the trial judge, was allowed to prejudicially slander the defendant with repeated references to Vietnam. The State of Florida won a conviction only after insinuating that the police officer, Defendant COBB, was a trigger-happy coward. At one point, the prosecutor shamed the jury shouting, "What does it take, a whole town to be killed before justice (i.e., a conviction of COBB) prevails". In this case, the only eyewitness to the incident was the police officer, COBB, your petitioner herein. His testimony was, that while placing a suspect under arrest, he was attacked. After being hit in the face and while struggling with the suspect for control of his service revolver, he shot him once in the head, killing him. Now let's compare the facts with the results. A conviction for manslaughter, for defending himself, if left as precedence and unclarified, leaves a question as to under what circumstances a police officer may lawful-

ly employ deadly force in any given situation. The jury was browbeaten and badgered by the prosecutor into finding the Petitioner guilty of manslaughter, regardless of the fact that throughout our Nation, the common law, statutes and Federal statutes allow that citizens may resort to deadly force to prevent their own death at the hands of a criminal aggressor intent upon fighting for the immediate use of deadly force against him.

As he did over and over during the trial, the prosecutor unfairly and prejudicially claimed that the officers and the City of Parkland shamed themselves by coming to COBB'S aid and further scolded the jury that it would "shame" (T.1056 and 1103) themselves in the eyes of the community if it did not return a guilty verdict.

Defendant's motion for a mistrial was denied by the acquiescent trial judge. The Petitioner's conviction under Florida Statute 782.11 violates Petitioner's constitutional

rights of due process. The statute is so vague, indistinct, inadequate and overbroad, that it violates the Defendant's rights under the Florida Constitution and the 5th and 14th Amendments of the United States Constitution. The statute unfairly focuses the inquiry of the trier of fact solely to the question of necessity and ignores the defenses of Florida Statute 776. The two Florida Statutes, as applied herein, cannot be reconciled.

In the recent Florida case of Mitchell v. State, 368 So.2d 607, a police officer was convicted of violating 782.11 while being acquitted of manslaughter under 782.07. The State appellate court reversed the conviction stating that the State had failed to prove what specific felony or unlawful act was committed by the decedent prior to his being killed by the policeman. In State v. Carrizales, 356 So.2d 274 (Fla. 1978) the Supreme Court held that section 782.11 Florida Statute

(1975) does not apply when the unlawful act allegedly committed by the decedent was the use of force directed against the Defendant, who claims that the killing was justifiable, as in lawful, self-defense. This holding is directly applicable to the situation involved in this case, in which, as in Carrizales, the only allegedly, "unlawful acts" of the victim were those which gave rise to the Defendant's use of force in attempting to effect the victim's arrest.

The purpose of Section 782.11 Florida Statutes (1975) is to reduce the charge and therefore, the penalty, when a killing which might otherwise constitute first or second degree murder is committed in resisting an attempt to commit an independent unlawful act, which does not involve force directed against the defendant. Whitehead v. State, 245 So.2d 94 (Fla.2 DCA 1971). Though vague, the statute was apparently supposed to be applied in cases as when a person, with specific intent to use

deadly force, kills someone attempting to break into his home. It does not apply, however, to cases like Carrizales and this one, in which the issue is whether the Defendant has employed justifiable deadly force (and was therefore guilty of no crime at all) in countering the "unlawful acts of the victim", Whitehead, supra at page 609. Based upon this interpretation, COBB was clearly unlawfully and unconstitutionally prosecuted and convicted under Florida Statute 782.11. Florida's unnecessary killing statute 782.11 is so vague that various courts of appeal and the Florida Supreme Court give it a case by case interpretive meaning. The point remains shockingly clear that COBB'S due process rights were violated by a conviction, under an overbroad statute, where he, immediately before the killing, while attempting to make a lawful arrest, was attacked by a third party from behind and then became involved in a life or death struggle with a criminal suspect for

control of his own gun. Under the Mitchell standard, 782.11 does not apply to this set of facts and Petitioner COBB'S prosecution thereunder violated constitutional due process requirements.

Florida Statute 782.11 provided COBB no fair warning here, as is embodied and required in the Due Process Clause, Rose v. Locke, 423 U.S. 48 (1975).

The Petitioner's conviction can't be squared with the 14th Amendment of the U.S. Constitution.

The fundamental concept of fairness and the principal that due process requires that criminal statutes give sufficient warning to enable men to conform their conduct to avoid that which is forbidden, is one of the great bulwarks of our scheme of constitutional liberty. Rose v. Locke, supra.

Under the totality of the circumstances in this case, Petitioner WILLIAM COBB, was denied substantive due process. He was convicted

under a statute which does not provide sufficient standards for a reasonable person to understand what conduct the statute prohibits. The standards which determine what constitutes a violation under 782.11 were first propounded by the Supreme Court of Florida when ruling on Mr. COBB'S appeal. This clearly constitutes an ex post facto law contrary to Article 1, Section 10 of the United States Constitution.

At the time of the incident in question, Officer COBB acted pursuant to the authority provided a police officer under Chapter 776 of the Florida Statutes and Florida decisional law. Officer COBB'S actions were completely justifiable and his conviction was in great part a result of both the confusion of the Trial Judge and the inflamatory remarks of the prosecutor. Most importantly, however, a conviction of a police officer under the facts of this case for unnecessarily killing another, creates a vague and unreliable standard under which police officers are in a real

and present danger of criminal liability while acting in the line of duty. For these reasons as well as those stated below, WILLIAM COBB'S petition for writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

THE TRIAL RECORD IS DEVOID OF EVIDENCE TO SUPPORT PETITIONER'S CONVICTION BEYOND A REASONABLE DOUBT.

A. Sufficiency of the Evidence.

The standard for reviewing federal habeas corpus challenges contesting the sufficiency of evidence in a state court conviction was announced by the Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1937). Under Jackson, a conviction must be reversed if, after viewing the evidence in the light most favorable to the prosecution, a court finds that no rational trier of fact could have found, beyond a reasonable doubt, sufficient evidence of the crime for which the Defendant was convicted.

WILLIAM COBB was convicted of violating Florida Statute, Section 782.11 (1975), Unnecessary Killing to Prevent an Unlawful Act. In order to uphold this conviction, the Court must determine that the killing was not justified under the provisions of Chapters 776 and 782, Florida Statutes. Florida

Statute 776.05 permits the use of deadly force in placing a suspect under arrest and Florida Statute 776.07(1) permits the use of deadly force in maintaining an arrestee under custody. Similarly, Florida Statute Section 782.02 justifies one's use of deadly force in resisting any attempt to commit a felony upon him.

The evidence adduced at trial concerning the death of ELDRIDGE shows that Officer COBB was struck in the eye during the struggle, (T.43,68,95,141,762-3,833-4,998-1000) that there was a grapple for COBB'S gun which left imprints in COBB'S hand (T.838), that the struggle was violent enough to dislodge the beer cans attached to ELDRIDGE'S belt, and that ELDRIDGE'S hat was not dislodged from his head during the struggle and that ELDRIDGE was shot once in the back of the head at a 35° downward angle. (T.512-516).

Taking all of the evidence in the light most favorable to the prosecution, there is

insufficient evidence to prove that the killing of ELDRIDGE was unnecessary beyond a reasonable doubt. There was no evidence presented that the decedent had ceased struggling over the gun or that he had been subdued by Officer COBB. There was no evidence that ELDRIDGE had discontinued his violent attempts to escape from custody. Despite repeated misapprehensions by the various reviewing courts in this matter, ELDRIDGE had only been shot once (T.512-516). COBB'S testimony was and remains undisputed that ELDRIDGE hit him in the eye with the handcuff, temporarily blinding him (T.43,68,72,95,141,762-3,833-4, 998-1000) and that ELDRIDGE grabbed COBB'S gun and they were struggling over possession of it when the gun went off (T.68,137,141,142, 763,764,835,836,998-1000).

The only salient evidence to support the conviction was the testimony of the pathologist that ELDRIDGE was shot in the back of the head at a 35° downward angle with his hat

still on. (T.512-516) This evidence taken with the rest of the evidence concerning the struggle, does not allow a rational jury to find COBB guilty beyond a reasonable doubt. The angle of the bullet wound and the fact that he had his hat on, is not inconsistent with the evidence concerning the struggle. In fact, it supports WILLIAM COBB'S testimony that the struggle involved both parties spinning around while struggling for possession of the weapon (T.836) As Judge Alderman stated in his dissenting opinion from the Florida Supreme Court:

> "The fact that ELDRIDGE had his hat on and that he was shot in the back of the head is not inconsistent with COBB'S description of the life and death struggle between him and ELDRIDGE."

Cobb v. State, 376 So.2d 230 (Fla. 1979) at p. 233.

B. Failure of State to Meet Its Burden of Proof.

On review of a State criminal conviction in Federal Court through a petition for habeas

corpus, the reviewing court must determine whether there remains a reasonable doubt as to the truth of any of the substantial elements included in the definition of the crime. Holloway v. McElroy, 632 F2d 605 (5th Circuit, 1980). In the case at bar, the prosecution had the burden of proving that the killing of ELDRIDGE was unnecessary under Florida Statute 782.11. As there were no eyewitnesses to Mr. ELDRIDGE'S demise, the State sought to prove their case through the use of circumstantial evidence, i.e., that ELDRIDGE was shot in the back of his head with his hat still on.

It is the standard in Florida that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972, (Fla. 1977). The version of the events related by the defense

must be believed if circumstances do not show that version could be false. McArthur, supra.

The State in this case, clearly failed to meet their burden of proof. The evidence presented by the State was not inconsistent with the Petitioner's version of the events and did not support the jury's verdict. The fact that ELDRIDGE still had his hat on is consistent with WILLIAM COBB'S version of the struggle. The beer cans at ELDRIDGE'S waist had been knocked off from their plastic holder during the struggle. (T.616) Mr. COBB also testified that he was temporarily blinded, was weakened, and could not clearly see ELDRIDGE and that during the struggle when the fatal shot was fired, they were going around in circles, around each other. (T.836) This is consistent with ELDRIDGE'S having been shot in the back of the head during the struggle.

It was the State's burden to prove that the events of that struggle as testified to repeatedly by the Petitioner were false. The

State never met that burden, and without having met that burden, no rational trier of fact could have found WILLIAM COBB guilty beyond a reasonable doubt.

THE COURTS BELOW ERRED IN NOT FINDING THAT FLORIDA STATUTES 776.05 AND 776.07(1) JUSTIFIED THE PETITIONER'S USE OF DEADLY FORCE UNDER THE FACTS OF THIS CASE AS A MATTER OF LAW.

In these times of epidemic crime, there is a compelling and important national need for effective law enforcement. Before subjecting themselves to criminal prosecution for acts taken in the line of duty, every police officer has the fundamental right to be clearly informed of the extent of his lawful authority and the limitations of it. For this reason, the Supreme Court should grant Petitioner COBB'S writ of certiorari and address and answer the following question; which affects every law enforcement officer in the United States. Do the several States violate a police officer's constitutional rights of Due Process and Equal Protection by convicting him of homicide, resulting from the officer's use of force during a lawful arrest, where the use of force by the officer is lawful under one state law and unlawful under another state law?

WILLIAM COBB was convicted of unnecessarily killing DONALD ELDRIDGE while Officer COBB was attempting to take ELDRIDGE into custody after ELDRIDGE had been placed under arrest for trespassing. (T.134,729,822,987) The undisputed facts show that ELDRIDGE was killed while struggling for possession of COBB'S service revolver. (T.137,141,142,763,764,835, 836,998,999,1000)

The actions taken by WILLIAM COBB in pursuit of his duties as a police officer, including the killing of DONALD ELDRIDGE, are clearly authorized and justified under both Florida and Federal law.

Florida Statute 776.05(1975) states:

> "A law enforcement officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice."

Florida Statute 776.07(1) (1975) states:

> "(1) A law enforcement officer or other person who has an arrested person in his custody is justified in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person from custody."

When DONALD ELDRIDGE was first arrested by Officer COBB, he had been found trespassing, a misdemeanor. (T.726,822,987) However, ELDRIDGE assaulted COBB, striking COBB in the head with the handcuffs, and then attempted to wrest COBB'S service revolver from COBB'S grasp. (T.68,137,141-2,762-4,833-6,998-1000) Under Florida law, resisting an officer with violence is a third degree felony (Florida Statute 843.01) and the act of striking Officer COBB in the head with the handcuffs constitutes assault and battery on a law enforcement officer, a third degree felony. (Florida Statute 784.07)

Through ELDRIDGE'S attempt to escape from custody of Officer COBB, ELDRIDGE'S status graduated to that of a felon.

Florida Statutes 776.05 and 776.07(1) authorized WILLIAM COBB to use any force to maintain ELDRIDGE in his custody and to prevent his escape.

The cases in Florida clearly demonstrate the justification of the degree of force used by COBB. In Gordon v. Alexander, 198 So.2d 325, (Fla. 3rd DCA, 1967); City of Miami v. Nelson, 186 So.2d 535 (Fla. 2d DCA, 1966), and City of St. Petersburg v. Reed, 330 So.2d 256 (Fla. 2d DCA, 1976), police officers shot and wounded a fleeing person whom they suspected of having committed a felony. Each of the officers in these cases were held blameless. Each case stated that the police "were entitled to use force as was reasonably necessary to effectuate his capture even to the extent of killing or wounding him." Gordon v. Alexander, supra at p. 327; Miami v. Nelson, supra at p. 538. In these cases, the arrestee was merely "suspected" of having committed a felony. In the case sub judice, Officer COBB

actually witnessed and was the victim of the felony, and he therefore had the right to use whatever force was necessary to maintain ELDRIDGE in his custody and to prevent his escape.

WILLIAM COBB did not have to wait until ELDRIDGE had him in a helpless position or had possession of COBB'S gun. In effectuating an arrest, "an officer is not required to take unnecessary or undue risks in the performance of his duties." Hebah v. United States, 456 F2d 696 (Ct.Cl.) 1972 at p. 705. Officer COBB acted as any law enforcement officer in a like situation would have.

The decision of Officer COBB to pull the trigger at the moment he did cannot be judged from a remote vantage point. His actions must be weighed in light of the circumstances as they appeared at the scene at the time in question. Hebah v. United States, supra.

> "Police officers, in enforcing the law, are called upon to exercise a degree of judgment in situations that demand on-

> the-spot decisions and under such circumstances, are accorded a greater leeway than an ordinary citizen in the exercise of that judgment in determining the necessity and amount of force required under particular situations to effect an arrest and to retain in custody an alleged violator."

Weil v. City of Miami Beach, 158 So.2d 798 (Fla. 3rd DCA, 1963)

Officer COBB had been struck in the head by ELDRIDGE with a pair of handcuffs, his vision was impaired, and ELDRIDGE was struggling with COBB for possession of COBB'S service revolver. (T.68,762-3,833-6,998-1000) Officer COBB had to make a split second decision. He had no time to ruminate over what his options were. "It is the right of the general public to police protection and the duty owed to society by police officer." Miami v. Nelson, supra at p. 539. When Officer COBB was attacked and his attacker fought him for his gun, COBB had the right to use deadly force under Florida Law. If this conviction is allowed to stand, it puts the lives of all police officers in jeopardy of criminal prosecution if they defend

themselves as COBB did. As Justice Holmes stated in Brown v. United States, 256 U.S. 335 (1921): "Detached reflection cannot be demanded in the presence of an uplifted knife."

WILLIAM COBB had been doing his duty, lawfully and correctly. His use of deadly force was clearly justified pursuant to the laws then in effect in the State of Florida. The record clearly shows that ELDRIDGE'S attack on COBB was the second attack. COBB was knocked down from behind by ELDRIDGE'S companion immediately prior to the attack by ELDRIDGE. COBB'S conviction under these factual circumstances is a shameful due process violation. It is a travesty which if left to stand, sets a life endangering standard of conduct for police officers to follow, after being attacked during a lawful arrest. If COBB'S shooting of his attacker under these circumstances is not justifiable, it is impossible to see how any use of deadly force by a police officer in any situation could ever be justifiable. For

these reasons, WILLIAM COBB'S Petition for Writ of Certiorari should be granted.

FLORIDA STATUTE 782.11 (1975) IS UNCONSTITUTIONALLY VAGUE

The Petitioner, WILLIAM COBB, was convicted of unnecessarily killing DONALD ELDRIDGE in violation of Florida Statute 782.11 (1975).

Florida Statute 782.11 (1975) states as follows:

> "Unnecessary Killing to Prevent Unlawful Act - Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter, a felony of the second degree, punishable as provided in section 775.082, s.775.083, or s. 775.084."

The operative phrase of this Statute is: "unnecessarily kill another". The factual determination that must be made is what constitutes an "unnecessary" killing. There is no definition of "unnecessary" on the face of the Statute nor are there any cases reported involving a police officer, prior to the case sub judice. (See: 22 West's Florida Statutes Annotated, (1976) page 328.) Florida Statute 782.11 (1975) does not provide a standard of

"necessity" and thereby fails to provide fair notice as to the circumstances that would constitute an "unnecessary" killing.

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

United States v. Harriss, 347 U.S. 612 (1954) at page 617; Williams v. United States, 179 F2d 644 (5th Circ. 1950). A conviction under this statute, which fails to give notice of what specific conduct is proscribed, constitutes a denial of due process. United States v. Hayes, 589 F2d 811 (5th Circ. 1979) at p. 821; United States v. Incso, 496 F2d 204 (5th Circ. 1974).

A. Failure to Provide Ascertainable Standards.

Florida Statute 782.11 (1975) contains an inherent ambiguity within it. In failing to provide any clue as to what constitutes an "un-

necessary" killing, the Statute also fails to state whether "necessity" is to be measured by an objective standard, a subjective standard, or some hybrid of the two. It is not stated anywhere as to whether "unnecessary" is to be measured by the defendant's good faith belief or whether the defendant's conduct is to be compared to the mythical "reasonable man under similar circumstances".

The ambiguity created by this failure to explicate the requisite "necessity" results in the failure to provide notice as to the general nature of what constitutes an "unnecessary" killing. Without providing a standard to measure the proscribed conduct, Florida Statute 782.11 (1975) violates the due process clause of the 14th Amendment to the United States Constitution. Coluatti v. Franklin, 439 U.S. 379 (1979) at p. 391.

Historically, courts have had trouble ascertaining definite standards with statutes whose key operative word was "necessary". The case

of Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971) states:

> "one need not inquire in great depth as to the meaning of such words as necessary" and "preserve" to conclude that the holdings of these cases are correct. "Unnecessary" has been characterized as vague by the United States Supreme Court and has been similarly described by other courts. It is "a word susceptible of various meanings." It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper or conducive to the end sought." at p. 1388.

In the case of Phillips v. Borough of Folcroft, Pennsylvania, 305 F.Supp. 766 (E.D. Pa. 1969), the Court was asked to rule on the constitutionality of a disorderly conduct statute which prohibited "unnecessary noises".

> "the real vice of this language is that it permits police and other officials to wield apparently unlimited discretionary powers in choosing those persons in violation of the ordinances."

The Supreme Court of Florida has likewise held that the use of the term "necessary" failed to provide adequate guidelines. In the case of State v. Winters, 346 So.2d 991 (Fla. 1977) in-

terpreting a penal statute, Florida Statute 827.05, which made it a crime to fail to provide "necessary food, clothing, shelter or medical treatment." When describing the standards of the statute, the Court states that the use of the phrase "necessary shelter" creates the situation where:

> "each person must ask just how much and what quality of food, clothing, shelter and medical treatment he must provide to avoid jeopardy. Nothing in the statute gives us the answer. There are no guidelines." at p. 993.

In the statute under which the Petitioner was convicted, Florida Statute 782.11 (1975), the operative words are "unnecessarily kills". There are no standards or guidelines in the Statute to define what is or is not necessary. Each person must ask just what is the necessity needed to avoid jeopardy. When Officer COBB was in the field with DONALD ELDRIDGE, there was no time for him to determine whether his actions would meet the non-existent standards of Florida Statute 782.11 (1975). Thus, Mr. COBB'S conviction is violative of due process in that the

statute under which he was convicted is not "sufficiently explicit so that men of common intelligence may ascertain whether a contemplated act is within or without the law." State v. Winters, supra, qt p. 993.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. State of New Jersey, 206 U.S. 451 at p. 453.

B. Enforcement of Florida Staute 782.11 (1975) Against The Petitioner In This Case Gives The Statute Meaning EX POST FACTO.

Substantive due process requires that a statute must inform a citizen in advance, by a reasonably ascertainable standard, what the crime shall be. Williams v. United States, supra. As stated above, prior to this case brought by the State of Florida against WILLIAM COBB, there had been no decisional case law in Florida, defining the standards to be used in applying Florida Statute 782.11 (1975) (to a police officer).

The standard to be used in defining the phrase "unnecessarily kill" was first determined and set forth by the Florida Supreme Court in Cobb v. State, 376 So.2d 230 (Fla. 1979) at p. 231. This establishment of the standard of conduct after the deed is done violates the ex post facto prohibition in the United States Constitution. Williams v. United States, supra at p. 647. The Court determined the definition of the phrase "unnecessarily kills" for the first time when deciding whether ELDRIDGE'S death was "unnecessary". Officer COBB did not have the benefit of the Court's analysis or its stated standard of conduct when he was engaged in his life and death struggle with ELDRIDGE. The Florida Supreme Court's determination came three years after the event. Application of this standard to WILLIAM COBB gives the meaning to the statute ex post facto and is therefore violative of Article 1, Section 10 of the United States Constitution.

C. Florida Statute 782.11 (1975) Is Violative of Due Process of Law Due to Its Being Overbroad.

The concept of "overbreadth" of a penal statute rests on principles of substantive due process. The issue in such cases is whether the language of the statute, if given its normal meaning, is so broad that its sanctions may apply to protected conduct. Landry v. Daley, 280 F2d 938 (N.D. Ill. 1968) at p. 951. It is clear that in the present case the statute is designed so as to allow as large a net as possible to be cast. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The plain language of the statute merely states that whoever shall "unnecessarily kill" another shall be deemed to be guilty. There are no standards, explanations or other yardsticks against which to assess a situation in terms of the requisite "necessity".

There are other statutes in force at the time of the incident hereunder consideration, which authorize the actions taken by Officer

COBB.

Florida Statute 776.05 (1975) allows a law enforcement officer to use any force which he reasonably believes to be necessary to defend himself from bodily harm. A review of the evidence and testimony in this case clearly shows that the action taken by Officer COBB was that which he reasonably believed to be necessary to protect himself from bodily harm. (T. 68, 141-2, 763-4, 835-6, 998-1000) The action taken by COBB in pulling the trigger of the gun while struggling with ELDRIDGE is a conduct protected under the terms of Florida Statute 776.05 (1975).

Florida Statute 776.07(1) similarly gives a law enforcement officer the authority to use any force that he reasonably believes to be necessary to prevent the escape of an arrested

person. The record is totally devoid of any evidence to contradict that which was presented by WILLIAM COBB to show that ELDRIDGE was struggling for possession of COBB'S service revolver in an attempt to escape custody. Officer COBB was not required to surrender his service revolver or to sustain serious injury before resorting to deadly force. (See Lanzetta v. State of New Jersey, supra; Hebah v. United States, supra; Weil v. City of Miami Beach, supra). He took that action which he reasonably believed necessary to protect his own life as well as to prevent his prisoner's escape. This is a purely subjective standard and the State never offered evidence to contradict this reasonable belief on the part of Officer COBB.

Sustaining the conviction of WILLIAM COBB, under Florida Statute 782.11 (1975) condemns him for conduct which is clearly and unrebuttably authorized under two other statutes. In addition, the Florida Supreme Court has found

the killing of a suspected felon to be justified merely because he was running away. Gordon v. Alexander, 198 So.2d 325 (Fla. 1967). In Gordon there was only a suspicion that the decedent had committed a felony and was some distance away from the arresting officer. In the present case, Officer COBB knew that ELDRIDGE had committed a felony because the felony was committed on COBB'S person. Officer COBB was authorized under the Gordon decision of the Florida Supreme Court to use deadly force to prevent ELDRIDGE'S escape, yet he was convicted under an apparently conflicting statute. This application of Florida Statute 782.11 (1975) to condemn COBB'S actions condemns that which was authorized under two different statutes and Florida case law. Thus, the application of Florida Statute 782.11 (1975) in this case is an overbroad application and is contrary to substantive due process standards under the United States Constitution.

THE PETITIONER, WILLIAM COBB, WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE TOTALITY OF THE CIRCUMSTANCES OF THE TRIAL.

A. Prosecutor's Remarks at Trial

"It is the responsibility of the prosecutor during a criminal proceeding to refrain from appeals to passion or prejudice and to restrict his comments to matters in the record and at issue. Dunn v. U.S., 307 F2nd 883, 886 (5th Circuit, 1962). During the trial of WILLIAM COBB, the prosecutor, Mr. KERN, breached this responsibility. Mr. KERN did this so severely as to infect the trial with unfairness and make the resulting conviction a denial of due process.

During his closing statement, Mr. KERN tried to answer the widespread public support that WILLIAM COBB had in the City where the killing occurred by making the following emotional plea:

> "As a matter of fact, I am really kind of appalled and I think you ought to be shocked and a little bit

> appalled by the complacency that Parkland can accept the death of two young men and can rally without even knowing the facts, to his support. I don't know what it takes in Parkland to get them a proper perspective. What does it take? A whole town to be killed out there? Can't we put things in a proper prospective?" (T.1056)

Mr. KERN did not stop at this point, however. He went far beyond the four corners of the indictment and attempted to prey on the national consciousness just recovering from the Vietnam War.

"You know, counsel was talking about the unreality --

> "oh, those boys, those heinous criminals were out to murder COBB. I thought he was maybe thinking about Vietnam. If this wasn't Parkland, this is Vietnam and those two boys out there picking mushrooms were a couple of North Vietnam infiltrators with submachine guns. That's the way COBB acted. Shoot them on sight." (T.1103)

> "Well, first let's look at Mr. COBB. He claims that he is a fine police officer. He has dedicated his life to police work. He didn't want to go to Vietnam because he might have to kill someone." (T.1057)

Mr. KERN also tried to tap nationalistic passions and emotionalism to influence the jury by comparing the actions of WILLIAM COBB in defending himself to police actions in communist countries:

> "That might be justifiable in Soviet Russia. That is what law enforcement might be there."
>
> "It isn't our automobiles and our materialistic society that is great. Russia can do that, or East Germany can do that ... It is our value of human life, our individual freedom that are important to us; our protection from abuse of police authority." (T.1098)

The prosecutor further attempted to arouse the sympathy and passions of the jury in favor of the decedent's parents and against the Defendant by saying:

> "If it was your son or your relatives who were involved in a burglary, or a rape, or some heinous crime, I know it would be a heavy pall to bear, but if it is your son out there trespassing, picking a few mushrooms, you might be angry with him, but I think there is certainly a distinction. I don't think it falls in the same category as being charged with a rape or a burglary, or a murder or something of that

nature." (T.1096)

Mr. KERNS also compared the Defendant to a "sodden drunk in a car who goes over and runs into a school bus and kills a bunch of children". (T.1100)

These remarks made by the prosecution in this case were deliberately designed to inflame and prejudice the jury, were not based on any facts or evidence before the court and were blatant attempts to divert and maniupulate the jury. Mr. KERN'S conduct inflicted substantial prejudice upon the jury in a case where the evidence presented by the State was not clear and overwhelming. The State's case was tenuous at best and these remarks by the prosecution served to identify the Defendant in the minds of the jury as an evil, cowardly traitor to his country, who went around killing small children. The actual prejudicial impact of the inflamatory remarks by the prosecutor was contrary to both State law as well as Federal law. Carter v. State, 332

So.2d 120 (Fla. 2nd DCA 1976); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975); Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970; Davis v. U.S., 214 So.2d 41 (Fla. 3rd DCA 1968); Dunn v. U.S., 307 F2d 883 (5th Circuit 1962); Perry v. Mulligan, 399 F.Supp. 1285 (1975).

The Petitioner in this case was entitled to be tried only on those matters appearing within the four corners of the indictment. Perry v. Mulligan, supra. This right was denied WILLIAM COBB, and as a result of the frame of mind the jurors were placed in by these statements, the Defendant was convicted. These statements were so severe that neither objection nor curative instruction could have overcome their prejudicial impact. WILLIAM COBB was denied due process of law and his petition for a writ of certiorari should be granted.

B. Application of the Wrong Law

A defendant has the right to have the law in

effect at the time of the commission of the offense with which he is charged, control the facts of his case. Florida Constitution, Article 10, Section 9; Whatley v. State, 46 Fla. 145, 35 So. 80 (1903); Shields v. State, 78 Fla. 524, 83 So. 391 (1919).

In 1974 and again in 1975, the Florida Legislature broadened the policeman's right to use force in Florida laws 74-383, Section 13 and Florida laws 75-64. Prior to these enactments, a law officer could use deadly force to effect the arrest of a fleeing felon when necessary and Florida Statute, Section 776.07 (1)(1975) expanded the right to use deadly force as follows:

> "A law enforcement officer of other person who has an arrested person in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person from custody."

Florida Statute 776.05(1975) similarly expanded the right to use force as follows:

> "A law enforcement officer, or any person whom he has summoned or direc-

> ted to assist him, need not retreat or desist form efforts to make a lawful arrest because of resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice."

After the 1974 and 1975 enactments, a police officer was authorized to use <u>any</u> force to prevent an escape whether or not the arrestee is a felon. There is no question that ELDRIDGE had been placed under arrest (T.134,726,756,765,808,821-23,986-987). The evidence and testimony are unrebutted that ELDRIDGE tried to pull free of Officer COBB, and attempted to take his gun. (T.68,137,141, 142,727,834-835) Officer COBB had been hit in the head twice. (T.43,68,72,95,726,723-733, 756,763,823,834-835,978,988) No rational trier of fact could come to any conclusion other than that ELDRIDGE was trying to escape from custody. Florida Statutes 776.07(1)(1975) and 776.05 (1975) were enacted by the Florida

Legislature to govern situations precisely as that which occurred between Officer COBB and ELDRIDGE and DAUGHERTY. Officer COBB did not have the benefit of these statutes and the broadened authority it gave to police officers, at trial. The jury which decided Mr. COBB'S case did not have the benefit of being completely instructed on the law in effect at the time of the shooting. The Trial Court erred when it denied COBB'S requested jury instructions. As a result, Mr. COBB was denied a full and fair trial of his case, and was denied due process of law.

C. Misinterpretation of Evidence.

In the opinion of the Florida Supreme Court, Cobb v. State, supra, and in the recent opinion by the former Fifth Circuit of Appeals in Cobb v. Wainwright, opinion issued February 4, 1982 (5th Circuit), both reviewing courts erroeneously state that the decedent ELDRIDGE was shot twice in the back of the head. What Doctor Kelley testified

to at trial was that there were two wounds in ELDRIDGE'S head, one, an entrance wound, and one an exit wound from the same bullet. (T.512-516)

The erroneous premise that there were two bullets shot in the back of the decedent's head appears to be a major factor in the Fifth Circuit's recent opinion (at p.14507). In fact, ELDRIDGE was only shot once. This misapprehension of the facts by the Fifth Circuit may have been the turning factor in their holding denying the writ of habeas corpus.

D. Conclusion

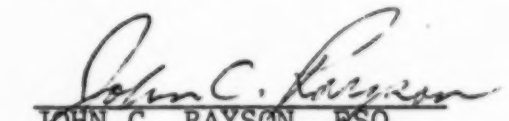
Taking the totality of the circumstances as they existed at the time of the trial in this case, the Petitioner was denied due process of law. The prosecutor went about strengthening a weak case by preying on the emotions, sympathies and prejudices of the jury, and not by presenting the facts and the evidence. The Court incorrectly applied the

wrong law to this case and did not give the jury instructions concerning the law that was beneficial to Mr. COBB, which he requested. Finally, the reviewing courts and quite possibly, the Trial Court as well, assumed that because there were two wounds in ELDRIDGE'S head, that he had been shot twice. He had only been shot once. These factors taken in conjunction with the tenuous and circumstantial nature of the State's case, worked to deny the Defendant (Petitioner herein) a fair trial and denied WILLIAM COBB due process of law.

For all the foregoing reasons, Petitioner, WILLIAM D. COBB respectfully asks that this petition for a writ of certiorari be granted.

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari has been sent by Federal Express to ROBERT L. BOGEN, ESQ., Office of the Attorney General of the State of Florida, 111 Georgia AVenue, West Palm Beach, Florida 33401, this 1st day of April 1982.

RESPECTFULLY SUBMITTED,



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Appendix

APPENDIX A

OPINIONS

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Opinion and Denial of Rehearing of the Circuit Court of Appeals, Formerly the Fifth Circuit February 4, 1982.

William D. COBB, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, Respondent-Appellee.

No. 80-5488

United States Court of Appeals
Fifth Circuit*
Unit B

Feb. 4, 1982

Appeal from the United States District Court for the Southern District of Florida.

As Amended on Denial of Rehearing.

Before GODBOLD, Chief Judge, KRAVITCH, Circuit Judge and THOMAS**, District Judge.

It is ordered that the petition for rehearing filed by the petitioner is DENIED.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

**Honorable Daniel H. Thomas, District Judge for the Southern District of Alabama, sitting by designation.

However, because of an inadvertent error in quoting a statute, we withdraw our original opinion 656 F.2d 982 (5th Cir.) and substitute the following in its place:

(1) Appellant William D. Cobb, was convicted by a jury in Florida District Court of unnecessarily killing to prevent an unlawful act in violation of Fla.Stat. §782.11 (1975) and was sentenced to fifteen years imprisonment. After exhausting state court remedies, he petitioned the United States District Court for the Southern District of Florida for habeas corpus relief pursuant to 28 U.S.C. §2254, alleging that he was denied due process because Fla.Stat. §782.11 (1975) is unconstitutionally vague and because the prosecution's evidence was insufficient to prove that the killing was unnecessary.[1] The District Court denied the appellant's petition. We affirm.

1. The petitioner informs this court in his Petition for rehearing that the trial court improperly instructed the jury as to the 1974 version. Peti-

On June 16, 1976, Cobb, then a police officer, received a report that two trespassers had entered a pasture in Parkland, Florida, known to contain hallucinogenic mushrooms. Cobb drove to the pasture, accompanied by a Parkland resident, and entered it with the intention of arresting the trespassers. The resident remained in the car and was unable to see the ensuing events.

tioner apparently did not raise this issue in the trial court and did not assert it on direct appeal or in his application for writ of habeas corpus. The issue is therefore not properly before us. See Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978). Thus, for the purpose of this appeal, we assume, as did the district court and Florida Supreme Court, that the trial judge properly instructed the jury as to Fla.Stat. §776.05 (1975). If he did not, this opinion should not be read as precluding the petitioner from properly raising in state court the claim that the jury was improperly charged.

(2) Cobb's testimony and other evidence introduced at trial[2] indicate that shortly after entering the pasture he came upon Donald Eldridge, whom he attempted to arrest. Eldridge willingly permitted Cobb to handcuff his left wrist, but before Cobb could secure the right one, Cobb was jumped from behind and knocked to the ground by the second trespasser, Roger Daugherty. After getting to his feet and while maintaining his hold of Eldridge, Cobb observed Daugherty once again approaching and pulled his revolver. When Daugherty failed to respond to an order to stop and a warning shot, Cobb fired twice at Daugherty, mortally wounding him. Eldridge and Cobb then began to scuffle, during which time Eldridge grabbed

2. Other evidence presented at trial included the testimony of those who arrived on the scene after the killings, those with whom Cobb Discussed the events of the day, the medical examiner who examined the victims, experts in the fields of serology and ballistics, and a number of other witnesses.

Cobb's gun. Cobb managed to wrest the gun from Eldridge's grasp and purposely shot Eldridge. The medical examiner found that two bullets entered the back of Eldridge's head, followed a 35° downward path, and exited the right frontal bone, immediately killing him. The bullets also passed through a straw hat that remained on the victim's head despite the scuffle, At the time of the shootings, Cobb was aware that both victims were unarmed. The jury found Cobb guilty of unnecessarily killing Eldridge in violation of Fla.Stat. §782.11 (1975), but acquitted him of unnecessarily killing Daugherty.[3]

Petitioner first claims that Fla.Stat. §782.11 (1975), Unnecessarily Killing to Pre-

3. Following his conviction in the trial court, petitioner appealed to the District Court of Appeal in Florida, Fou[illegible] District. The appeal was transferred t[illegible] the Florida Supreme Court, which upheld the conviction. Cobb v. State, 376 So.2d 230 (Fla. 1979). Because Cobb raised the same issues in his direct ap-

vent An Unlawful Act, is unconstitutionally vague. Fla.Stat. §782.11 (1975) provides that:

> Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter, a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

The essence of petitioner's vagueness claim is that the phrase "unnecessarily kill" is so imprecise that an individual cannot reasonably understand the conduct prohibited by the statute.

peal that he presents as grounds for federal habeas corpus relief, he has sufficiently exhausted his state judicial remedies within the meaning of 28 U.S.C. §2254(b). Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc).

The due process clause of the fourteenth amendment prohibits states from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 342 U.S. 612,617,74 S.Ct. 808,811,98 L.Ed. 989 (1954); United States v. Insco, 496 F.2d 204, 208 (5th Cir. 1974). But due process does not require impossible standards of specificity in criminal statutes. As the Supreme Court explained in Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243,46 L.Ed 2d 185 (1975), the

> prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for '(i)n most English words and phrases there lurk uncertainties.' Even trained lawyers may find it necessary to consult legal dictionaries, treatises,

and judicial opinions before they may say with any certainty what some statutes may compel or forbid. All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.

Id. at 50,96 S.Ct. at 244 (citations omitted).[4]

(3,4) Applying this standard, we find that Fla.Stat. §782.11 (1975) is not unconstitutionally vague. The statutory language clearly indicates that Fla.Stat. §782.11 is an exculpatory provision that serves to reduce to manslaughter any punishable homicide committed

4. For other Supreme Court decisions discussing the proscribed activities, see e.g., United States v. Harriss, 347 U.S. 612,74 S.Ct. 808, 98 L.Ed. 989 (1953) ("if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise"); United States v. Petrillo, 332 U.S. 1,67 S.Ct. 1538, 91 L.Ed 1877 (1947) ("That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold that that statutory language is too ambiguous to define a criminal offense.")

while resisting a victim's attempt to perpetrate an unlawful act. See Carrizales v. State, 345 So.2d 1113, 1115 (Fla.App.1977). The term "unnecessarily kill" merely serves as a catch-all phrase that brings within the scope of the provision homicides otherwise punishable under Florida law and does not establish a new substantive offense. Under Florida law, a homicide is punishable if it is not justifiable under either Fla.Stat. §782.02 (1975)[5] or Chapter 776 of the Florida statutes[6] or is not excusable under

5. Fla.Stat. §782.02 (1975) provides that "(t)he use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be."

6. Chapter 776 of the Florida Statutes contains a number of provisions defining the justifiable use of force in various circumstances. Relevant for the purposes of this case are Fla.Stat. §§ 776.05, 776.06, and 776.07. Fla.Stat. §776.05 (1975) states that

> A law enforcement officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts

Fla.Stat. §782.03 (1975).[7] Thus, by reading Fla.Stat. §782.11 in the context of other provisions of the Florida criminal code,[8] a reasonable person can ascertain that the phrase "unnecessarily kill" refers to any homicide not justified or excused under Florida law. We therefore agree with both the district court and Florida Supreme Court[9] that when read within its statutory framework, Fla.Stat. §782.11 is sufficiently precise to satisfy the dictates of due process.

to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in arresting felons fleeing from justice.

Fla.Stat. §776.06 (1975) defines deadly force as force which is likely to cause death or great bodily harm and includes, but is not limited to:

(1) The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm and includes, but is not limited to:

(2) The firing of a firearm at a vehicle in which the person to be arrested is riding. And

II

(5-8) Petitioner also argues that he was denied due process because the evidence introduced at trial was insufficient to support his conviction. Our task in addressing such a claim on habeas review is to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact

> Fla.Stat. §776.07 (1975) specifies the level of force a law enforcement officer or other person can use to prevent an escape, stating
>
> (1) A law enforcement officer or other person who has an arrested person in his custody is justified in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person from custody.
>
> (2) A guard or other law enforcement officer is justified in the use of force, including deadly force, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

7. Fla.Stat. §782.03 (1975) defines excusable homicide as a homicide.

> committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful in-

could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979). To find petitioner guilty of unnecessary killing to prevent an unlawful act under Fla.Stat. §782.11 (1975), the jury had to determine that the homicide was neither justifiable under Fla.Stat. §§ 782.02, 776.05, or 776.07 (1975) nor excusable under Fla.Stat. §782.03 (1975). A homicide is excusable under Fla.Stat. §782.03 (1975) only if committed by "accident and misfortune" and without

> tent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

8. Construing Fla.Stat. §782.11 in this manner is consistent with established Florida law, which provides that a statutory provision must be read in the context of the entire statute. See Campbell v. State, 240 So.2d 298 (Fla. 1970); Carter v. State, 155 So.2d 787 (Fla. 1963).

9. Cobb v. State, 376 So.2d 230, 231 (Fla. 1979).

"any dangerous weapon being used."[10] Because petitioner testified that he purposely shot Eldridge, a rational jury certainly could have found that the killing of Eldridge was not excusable. Under the relevant justifiable homicide provisions, petitioner would have been justified in using any force which he reasonably believed necessary to defend himself, Fla.Stat. §776.05 (1975),[11] or to prevent the escape of an arrested person from custody. Fla. Stat. §776.07 (1975),[12] and would have been justified in employing deadly force to resist an attempt to take his life or to commit a felony upon his person, Fla.Stat. §782.02 (1975).[13] After carefully reviewing the record, we find that a rational jury could have found beyond a reasonable doubt that the

10. See note 7 supra.

11. See note 6 supra.

12. See note 6 supra.

13. See note 5 supra.

use of deadly force was unjustified under the circumstances. The only witness to the killing was the petitioner. He testified that he deliberately shot Eldridge during a struggle with the victim. However, the pathologist's findings indicated that the victim was shot twice in the back of the head and that the bullets followed a 35° downward path, exiting his right frontal bone. The evidence also demonstrated that holes in Eldridge's hat correlated to the deceased's head wounds, revealing that the hat remained on Eldridge's head despite the alleged struggle. Moreover, the petitioner's testimony established that he was aware that the victim was unarmed. The jury has the sole responsibility to judge the weight and credibility of the evidence, and in light of all the evidence could have rationally decided beyond a reasonable doubt that the killing of Eldridge was unjustified. Thus, we agree with the district court that a rational jury could have

found beyond a reasonable doubt that petitioner unnecessarily killed Eldridge in violation of Fla.Stat. §782.11 (1975) AFFIRMED.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

WILLIAM D. COBB,)
Petitioner,)
v.)
LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation,)
Respondent.)

CASE NO. 79-6666-Civ-ALH

ORDER OF DISMISSAL

William D. Cobb has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254, attacking a sentence of fifteen (15) years imposed by the Seventeenth Judicial Circuit, in and For Broward County, Florida, on February 4, 1977. The sentence was imposed pursuant to a jury verdict of guilty to the charge of unnecessary killing to prevent an unlawful act, following a trial by jury in Case No. 76-3161.

Petitioner is currently in the custody of Louie L. Wainwright, Secretary of the Depart-

ment of Offender Rehabilitation for the State of Florida.

> As grounds for relief, Petitioner alleges the following:
>
> 1. That Fla.Stat. Section 782.11 (1975), under which he was tried and convicted, is unconstitutionally vague so as to deny him due process.
>
> 2. That he was denied due process because the evidence was insufficient to prove that the killing was unnecessary.

Following his conviction in the trial court, Petitioner instituted a direct appeal in the District Court of Appeal of Florida, Fourth District. The appeal was transferred to the Florida Supreme Court, which subsequently affirmed the conviction. Cobb v. State, 376 So.2d 230 (Fla. 1979). Because Cobb raised the same issues in his direct appeal that he now presents as grounds for relief for federal habeas corpus, this Court finds that he has sufficiently exhausted his state judicial remedies within the meaning of 28 U.S.C. Section 2254(b). Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438

(1971); Lamberti v. Wainwright, 513 F.2d 277 (5th Cir. 1975).

As his first ground for relief, Petitioner claims that Fla.Stat. Section 782.11, Unnecessary Killing To Prevent An Unlawful Act, is unconstitutionally vague. Therefore, he contends that his conviction for a violation of that statute was a denial of due process. Fla.Stat. Section 782.11 (1975) provides as follows:

> Whoever shall unnecessarily kill another either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of mansalughter, a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

As a matter of due process, it is clear that a criminal defendant should not be held responsible when he cannot reasonably understand the conduct that is prohibited. Rose v. Locke, 423 U.S. 48,96 S.Ct. 243, 46 L.Ed. 2d 185 (1975); United States v. Insco, 496 F.2d 204 (5th Cir. 1974). The Supreme Court

noted, however, that a statute is not unconstitutionally vague simply because it could have been drafted with greater precision. Rose v. Locke, supra.

The Florida Supreme Court considered this claim raised by Petitioner and found that it was not vague in violation of Florida and federal constitutional law:

> When the words "unnecessarily kill" in section 782.11 are considered together with the remainder of chapter 782, they are sufficiently precise to meet the constitutional standard for definitness in penal statutes. Homicides committed while resisting another's unlawful act are punishable only if not excusable, as provided in section 782.03, Florida Statutes (1975), or if not justifiable, as provided in section 782.02 or chapter 776, Florida Statutes (1975). Read with these provisions, section 782.11 is not impermissibly vague. Cobb v. State, supra at 231.

The construction of the statute by the Florida Supreme Court follows established Florida law that a statute must be read in the context of the entire act when challenges based on vagueness are made. State v. Joyce, 361 So.2d 406 (Fla. 1978); Campbell v. State,

240 So.2d 298 (Fla. 1970). In Campbell v. State, supra, the defendant challenged a Florida statute which proscribed unnecessarily or excessively chastising a child. The Court found that although the prohibited conduct was described in general terms, the conduct meant to be proscribed could be determined with reasonable certainty when read in the context of the entire act.

Therefore, as the Florida Supreme Court found in the construction and interpretation of its own state's statute, the term "unnecessarily kill" is not to be examined in isolation when challenged on the basis of vagueness, but rather must be read in the entire context in which it is found. In this case, the statute under which Cobb was convicted is within Chapter 782 of the Florida Statutes, entitled "Homicide." Therefore, as the Florida Supreme Court found, the words which Cobb claims are vague must be read in the context of justifiable homicide and excusable

homicide, Fla.Stat. Sections 782.02 and 782.03. The use of deadly force is justified when "a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be." Fla.Stat. 782.02. Homicide is excusable "when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner." Fla.Stat. Section 782.03. Furthermore, justifiable use of force, including the use of deadly force, is described in Chapter 776 of the Florida Statutes. This chapter describes when the use of force in defense of a person is justified, Fla.Stat. Section 782.03. Furthermore, justifiable use of force, including the use of deadly force,

is described in Chapter 776 of the Florida Statutes. This chapter describes when the use of force in defense of a person is justified, Fla.Stat. Section 776. 012, and when a law enforcement officer may justifiably use force when making an arrest, Fla.Stat. Section 776.05. Furthermore, the statute defines what constitutes deadly force, Fla.Stat. Section 776.06.

Therefore, when read in the context of the justifiable and excusable homicide statutes, it appears that an individual can determine with reasonable certainty what constitutes an "unnecessary killing." Therefore, Petitioner has been afforded sufficient notice of the scope of conduct so that the statute may withstand the challenge of unconstitutional vagueness. See, Rose v. Locke, supra.

As his second ground for relief, Petitioner claims that the evidence presented at trial was insufficient to support his conviction. He

claims that no evidence was presented by the State to prove that the killing was unnecessary.

Matters of sufficiency of the evidence are subject to review by this Court on habeas corpus only where a petitioner may have been denied due process. Dreske v. Holt, 536 F. 2d 105 (5th Cir. 1976), cert. denied 429 U.S. 1061 (1977); Ardister v. Hopper, 500 F.2d 299 (5th Cir. 1974). The most recent standard set forth by the United States Supreme Court for matters of sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, ____ U.S.____, 99 S.Ct. 2781 (1979); Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979).

The Florida Supreme Court reviewed the question of sufficiency of the evidence and found as follows:

There was sufficient evidence to sup-

port the jury's determination that the killing was unjustified. The major features of this evidence were Cobb's testimony concerning what transpired, testimony by the pathologist who performed an autopsy on Eldridge that the bullet entered the rear of Eldridge's head, followed a 35° downward path, and exited from the right frontal bone, and physical and testimonial evidence that holes in Eldridge's hat correlate to the deceased's head wounds (suggesting that the hat was still on Eldridge's head when he was shot). The jury could find from the evidence that Eldridge did not pose a threat sufficient to support Cobb's asserted belief that deadly force was necessary. Cobb v. State, supra, at 231, 232.

The evidence, based on the testimony by the pathologist and the testimony of Petitioner, who was the only witness to the crime, is sufficient to meet the standard of Jackson v. Virginia, supra.

Q. (Prosecutor) You always had the gun in your hand; didn't you?

A. (Petitioner) Yes, sir, I did.

Q. You say a shot rang out. Your hand was in the trigger?

A. My finger was in the trigger.

Q. In the trigger; right?

A. I had lost control of the handle for a short time.

Q. You lost control of the handle?

A. Yes, sir.

Q. And then you got the gun back?

A. I yanked it. (R.999)

* * *

Q. That is when you fired the final shot that struck Eldridge in the back of the head. You meant to pull that trigger?

A. At the time I yanked the gun, I pulled the trigger. That's correct.

Q. You meant to pull the trigger. It wasn't an accident?

A. No sir, it wasn't.

Q. Deliberately, you meant to pull the trigger?

A. Correct. (R.1000)

Cobb was the only witness to the crime. He testified in his own defense. The jury has the sole responsibility to judge the weight and credibility of that testimony. His testimony need not lead the jury to a conclusion that

the killing was not unnecessary. Therefore, when the evidence is taken in a light most favorable to the prosecution, this Court is unable to find, after careful review of the record, that the jury could not have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, supra; Reese v. Wainwright, supra.

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that this petition for writ of habeas corpus be, and the same is, hereby DISMISSED.

DONE AND ORDERED at Miami, Florida, this 8th day of April, 1980.

Alcee L. Hastings
United States District Judge

cc: Warner S. Olds, Esq.
Attorney for Petitioner

cc: Robert L. Bogen, Esq.
Office of the Attorney General
(West Palm Beach

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

WILLIAM D. COBB,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation,

Respondent.

_____/

CASE NO. 79-6666 Civ-ALH

ORDER

Upon due consideration and after due hearing, the Motion of the Petitioner for Release on Bail Pending Determination of issues presented by the Petition for Habeas Corpus filed herein, hereby is GRANTED.

While a state prisoner has no absolute right to bail pending resolution of his Petition for Habeas Corpus on the merits, nevertheless, the Petitioner has submitted legal argument in support of his Petition which raises substantial issues and his contentions of violations of Federal Constitutional rights have a reasonable likelihood of being sus-

tained. Baker v. Sard, 420 F.2d 1342 (D.C. Cal. 1969). A serious question exists as to the constitutionality of Florida Statutes 782.11.

Exceptional circumstances further have been shown which make the granting of bail proper.

The Petitioner is presently out on bond awaiting surrender. He is a former police officer and credible testimony was offered showing that the safety of police or law enforcement officers incarcerated in penal institutions is subject to great danger.

Further, Petitioner has impressed this Court as being a person entitled to bond consideration - He is employed, is living with his parents - his father is a deputy U.S. Marshall, and responsible members of his former community have submitted a petition asking that he remain free on bond until all of his rights on appeal are exhausted. Former Parkland City Commissioner, Francis Robert

Steele, testified that this Petition was circulated after the affirmance by the Florida Supreme Court and was meant to apply to the conclusion of all legal procedures. The threat of flight of the Petitioner from this jurisdiction is minimal.

There would be no affront to the State of Florida if the Petitioner were to continue on bond until his Petition for Writ of Habeas Corpus is determined.

Accordingly, it is

ORDERED AND ADJUDGED that, pending the determination of the Petition of WILLIAM D. COBB, for Writ of Habeas Corpus, and until further Order of this Court, WILLIAM D. COBB be released upon posting a Commercial Surety Bond in the amount of Ten Thousand Dollars ($10,000.00). For this purpose, if satisfactory to the Surety, this Court will accept the current Ten Thousand ($10,000.00) Dollar Surety Bond under which the Petitioner presently is bonded, if made out to the Clerk of

of the United States District Court for the Southern District of Florida.

WILLIAM D. COBB shall be permitted to reside at:

9500 Small Drive
Clinton, Maryland 20735

during the pendency of these proceedings.

DONE AND ORDERED at Miami, Florida, this 17 day of December, 1979.

HERBERT S. SHAPIRO
UNITED STATES MAGISTRATE

cc: Robert L. Bogen, Esq.
Office of the Attorney General
111 Georgia Avenue
West Palm Beach, Florida 33401

Richard Polin, Esq.
Olds & Titone, P.A.
3067 E. Commercial Blvd.
Ft. Lauderdale, Florida 33308

William D. COBB, Appellant,

v.

STATE of Florida, Appellee

No. 53832

Supreme Court of Florida.

March 29, 1979.

Rehearing Denied Nov. 13, 1979.

Defendant was convicted in the Circuit Court, Broward County, Hort Soper, J., of unnecessary killing to prevent unlawful act, and he appealed. The Supreme Court, England, C.J., held that: (1) words "unnecessarily kill" in statute making it a second-degree felony to unlawfully kill another to prevent an unlawful act were sufficiently precise to meet constitutional standard of definiteness in penal statutes; (2) evidence was sufficient to support finding that victim did not pose threat sufficient to support defendant's asserted belief that deadly force was necessary; (3) manslaughter and culpable negligence instructions were proper, and (4) prosecutorial

comments in closing argument did not constitute such grave error as to require mistrial.

Affirmed.

Alderman, J., concurred in part; dissented in part; and filed opinion.

Alan H. Schrieber, Public Defender and Stuart M. Lerner, Asst. Public Defender, Fort Lauderdale, for appellant.

Jim Smith, Atty. Gen., and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for appellee.

ENGLAND, Chief Justice.

This case is before us on transfer of an appeal commenced in the Fourth District Court of Appeal.[1] The court directly and initially passed on the validity of section 782.11, Florida Statutes (1975), which makes it a second-degree felony to

> unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall

1. See art. V, §2(a), Fla. Const; Fla.R.App.P. 9.040(b).

have failed . . ..

Pursuant to article V, section 3(b)(1) of the Florida Constitution, we have jurisdiction to review the trial court's order which upheld the validity of the statute.

On June 19, 1976, William Cobb, a police officer, responded to a report that two apparent trespassers were entering a field in Parkland, Florida. The field was known to contain hallucinogenic mushrooms, and the police department had been asked to guard against trespassers entering the property. Accompanied by a former Parkland resident, Cobb drove to the northern edge of the property, ordered his companion to remain with the car, and entered the field. Trees and foliage blocked the former resident's view of subsequent events.

Cobb's testimony and statements introduced at trial indicate that he came upon Donald Eldridge and attempted to arrest him for trespassing. After handcuffing Eldridge's

left wrist, but before his right hand could be secured, Cobb was accosted by the second trespasser, Roger Daugherty. Still holding on to Eldridge, Cobb fell to the ground, noticed Daugherty again approaching him, and pulled his revolver. When Daugherty did not respond to an order to stop and a warning shot, Cobb fired toward him. Daugherty fell mortally wounded. Eldridge and Cobb began to scuffle and during the course of the struggle, Eldridge received one fatal gunshot wounds to the head.

Cobb was indicted on two counts of unnecessary killing to prevent an unlawful act, and, after his motion to dismiss the indictment was denied, was tried and found guilty of the unnecessary killing of Eldridge.[2] In this appeal, he raises several points for our consideration.

2. The jury found Cobb not guilty of the unnecessary killing of Daugherty.

(1) Cobb first asserts that section 782.11 is unconstitutionally vague, in that the phrase "unnecessarily kill" lacks the explicit meaning necessary to apprise men of common understanding of the conduct to which it applies. We upheld a statute containing a similar phrase in Campbell v. State, 240 So.2d 298 (Fla.1970), where the defendant was charged with "unnecessarily or excessively" chastising a child. We there said:

> The particular words complained of, "unnecessarily or excessively" are not vague when considered in the context of the entire Statute and with a view to effectuating the purpose of the act. The fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness. Criminal laws are not "vague" simply because the conduct prohibited is described in general

language.[3]

When the words "unnecessarily kill" in section 782.11 are considered together with the remainder of chapter 782, they are sufficiently precise to meet the constitutional standard for definiteness in penal statutes. Homicides committed while resisting another's unlawful act are punishable only if not excusable, as provided in section 782.03, Florida Statutes (1975), or if not justifiable, as provided in section 782.02 or Chapter 776, Florida Statutes (1975). Read with these provisions, section 782.11 is not impermissably vague.

(2) Cobb further contends that the uncontradicted evidence adduced at trial establishes that Eldridge's killing was justified, pursuant to sections 776.05 and

3. 240 So.2d at 299. (Footnote omitted.) Similarly, we recently held that the term "necessary" is not unconstitutionally vague. State v. Joyce, 361 So. 2d 406 (Fla.1978), receding from State v. Winters, 346 So.2d 991 (Fla.1977), to the extent that dicta in that decision suggested otherwise.

776.07. These sections provide that any force is justifiable when a law enforcement officer "reasonably believes (it) necessary" to defend himself or prevent an escape. We disagree with Cobb. There was sufficient evidence to support the jury's determination that the killing was unjustified. The major features of this evidence were Cobb's testimony concerning what transpired, testimony by the pathologist who performed an autopsy on Eldridge that the bullet entered the rear of Eldridge's head, followed a 35° downward path, and exited from the right frontal bone, and physical and testimonial evidence that holes in Eldridge's hat correlate to the deceased's head wounds (suggesting that the hat was still on Eldridge's head when he was shot). The jury could find from the evidence that Eldridge did not pose a threat sufficient to support Cobb's asserted belief that deadly force was necessary.

(3,4) Cobb next asserts that the trial

court erred in giving jury instructions both on general manslaughter and on culpable negligence,[4] inasmuch as an "unnecessary killing" described in section 782.11 is a crime separate and distinct from general manslaughter. In view of the facts adduced at trial, we hold that the manslaughter and culpable negligence instructions were proper for the crime charged in this case.[5] The elements of general manslaughter, in conjunction with the additional factor of resistance against another's attempt to commit an unlawful act, can constitute "unnecessary killing" manslaughter.[6]

4. §782.07, Fla.Stat. (1975) provides:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

5. These instructions need not be applicable to every prosecution under section 782.11.

6. Cf. Whitehead v. State, 245 So.2d 94 (Fla.2d DCA

(5,6) Cobb raises as further error comments made by the prosecutor during closing argument which, Cobb contends, were so prejudicial as to deny him a fair trial. While Cobb's counsel moved for a mistrial in response to these comments, a mistrial motion is appropriate only when the error committed was so prejudicial as to vitiate the entire trial.[7] Our review of the record here indicates that the prosecutorial comments made in this case do not constitute such grave error.

Having considered all points claimed as error by Cobb, including those not discussed, we affirm Cobb's conviction and sentence.

It is so ordered.

1971) (elements of second-degree murder, in conjunction with an attempt to prevent an unlawful act, may constitute "unnecessary killing" manslaughter).

7. Perry v. State, 146 Fla. 187, 200 So. 525 (1941).

ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, J.J., concur.

ALDERMAN, J., concurs in part and dissents in part with an opinion.

ALDERMAN, Justice, concurring in part, dissenting in part.

I agree that section 782.11 is constitutional; however, I believe that the uncontradicted evidence in this case establishes that the killing was justified. The trial court should have granted Cobb's motion for judgment of acquittal.

If Cobb had known in advance that the two trespassers were going to resist arrest with violence, he probably would not have approached them alone. Under the circumstances, however, it was not unreasonable for him to proceed without a backup. From the evidence, there can be no other lawful conclusion but that Cobb, when he was attacked by the two trespassers, reasonably believed that the use of deadly force was necessary to defend himself. If he had not acted as he did, he

would not be the defendant in this case, but rather, probably would be the dead victim.

It is undisputed that when Cobb went into the field looking for the two trespassers, he first came upon Eldridge and told him that he was under arrest. After securing Eldridge's left wrist with a handcuff, he was jumped from behind by Daugherty. He was knocked down, and as he got up, he saw Daugherty running at him. He fired a warning shot, but Daugherty refused to stop. He then fired two more shots, killing Daugherty. (The jury found Cobb "not guilty" of this killing.) Then, while still holding Eldridge's right arm, Cobb moved toward Daugherty. Eldridge, without warning, swung his left arm around, striking Cobb in the eye with the handcuff. Cobb testified that when he was hit, all he "saw was white"; he was "dazed"; his "eyes started gushing water"; "it was more or less feel from there on out"; and he "couldn't focus in on anything." The next thing Cobb knew, Eldridge had "ahold

of the gun because I could feel the hammer of the gun pushing back into the palm of my hand." He was losing control of the gun. While fighting for the gun, Cobb "yanked the gun" back and pulled the trigger, and the gun went off, fatally wounding Eldrige. Cobb's testimony at trial was consistent with the statement that he had made prior to trial. The testimony of the pathologist as to the path of the bullet is not sufficient for the jury to conclude that the shooting happened in any manner other than that described by Cobb. The fact that Eldridge had his hat on and that he was shot in the back of the head is not inconsistent with Cobb's description of the life-and-death struggle between him and Eldridge.

Accordingly, I would reverse the conviction and discharge the defendant. Cf. McArthur v. State, 351 So.2d 972 (Fla. 1977).

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT

WILLIAM D. COBB,	)	
Appellant,	)	CASE NO. 77-263
v.	)	
STATE OF FLORIDA,	)	
Appellee.	)	

March 28, 1978.

BY ORDER OF THE COURT:

The appellant, William D. Cobb, was convicted for a violation of Section 782.11, Florida Statutes (1975) involving the unnecessary killing of a human being to prevent an unlawful act. Prior to trial Cobb filed a written motion to dismiss attacking the constitutionality of Section 782.11. The motion to dismiss was based solely on constitutional grounds. After a hearing, the trial court initially and directly passed on the validity of Section 782.11, and that juris-

diction of this appeal is in the Supreme Court pursuant to Article V, Section 3(b)(1), Florida Constitution.

For the foregoing reason, this court upon its own Motion pursuant to the provisions of Florida Appellate Rule 2.1a(5)(d), hereby

ORDERS that this cause be transferred to the Supreme Court of Florida for consideration and determination after five (5) days from this date unless, in the meantime, attorneys of record for the parties, or any of them shall bring to the attention of this Court that the above-styled cause is one which should be heard and determined by this Court. Unless such cause is shown by writing filed in this Court within the time stated, the Clerk shall complete the transfer in accord with the above directions without further order.

CLYDE L. HEATH
CLERK

cc: Stuart M. Lerner, Ass't Public Defender, 17th Judicial Circuit
Robert L. Bogen, Ass't Attorney General

State of Florida

VS

WILLIAM D. COBB

Sheriff's No. 76-9403
State Atty. Tom Kern
Ct. Rep. Rose Henry
Book 327 Page 287

FELONY
JUDGMENT AND SENTENCE

You, WILLIAM D. COBB, being now before the Court, attended by your attorney, Alan H. Schreiber, and you having been tried and found guilty of II. UNNECESSARY KILLING TO PREVENT UNLAWFUL ACT, the Court now adjudges you to be guilty of said crime.

THE JUDGMENT OF THE COURT and the Sentence of the Law that you be confined in the State Prison for a term of fifteen (15) Years, with credit for one (1) day served with the recommendation you be sent to Apalachee Correctional institute for First Offenders. DONE AND ORDERED in open Court at Fort Lauderdale, Broward County, Florida this 4th day of February, 1977.

Hort Soper
JUDGE, CIRCUIT COURT

APPENDIX B

STATUTES INVOLVED

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FLORIDA STATUTE 776.05 PROVIDES:

776.05 "Law Enforcement Officers; Use of Force in Making an Arrest"

"A law enforcement officer or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice."

FLORIDA STATUTE 776.07(1) PROVIDES:

"776.07 Use of Force to Prevent Escape"

"(1) A law enforcement officer or other person who has an arrested person in his custody is justified in the use of any force which he reasonably believes to be necessary to prevent the escape of the arrested person from custody."

FLORIDA STATUTE 782.11 (1975) PROVIDES:

"782.11 Unnecessary Killing to Prevent Unlawful Act"

"Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter, a felony of the second degree, punishable as provided in §775.082, §775.083 or §775.084."

FLORIDA STATUTE 782.02 PROVIDES:

"782.02 Justifiable Use of Deadly Force"

"The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be."

FLORIDA STATUTE 784.07 PROVIDES:

"784.07 Assault or Battery of Law Enforcement Officers or Firefighters; Reclassification of Offenses"

"(1)(a) As used in this section, the term "law enforcement officer" includes, but shall not be limited to, any sheriff; deputy sheriff; municipal police officer; highway patrol officer; beverage enforcement agent; county probation officer; state, county or municipal correctional officer; officer of the Parole and Probation Commission; parole and probation officer; and law enforcement personnel of the Game and Fresh Water Fish Commission and the Department of Natural Resources and Law Enforcement.

(b) "Firefighter" as used in this section shall mean any person employed by any public employer of this state whose duty it is to extinguish fires, to protect life or property, or to enforce municipal, county, and state fire prevention codes, as well as any law pertaining to the prevention and control of fires.

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of assault, from a misdemeanor of the second degree to a

felony of the third degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree."

FLORIDA STATUTE 843.01 PROVIDES:

"843.01 Resisting Officer With Violence to His Person"

"Whoever knowingly and willfully resists, obstructs or opposes any sheriff, deputy sheriff, officer of the Florida Highway Patrol, municipal police officer, beverage enforcement agent, officer of the Game and Fresh Water Fish Commission, officer of the Department of Natural Resources, any member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, any county probation officer or any personnel or representative of the Department of (Criminal) Law Enforcement or other person legally authorized to execute process, in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084."